IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

FRANK HOHN, Plaintiff, v. BNSF RAILWAY COMPANY, Defendant.	)	8:05CV552 COURT'S CHARGE TO THE JURY

INSTRUCTION NO. 1

You have heard the evidence. I am now going to inform you of the legal principles and considerations you are to use in arriving at a proper verdict, following which counsel will make their closing arguments.

In accordance with the oath which each of you took when you were selected as jurors to try this case, it is your duty to determine the disputed issues of fact in this case from the evidence produced and seek thereby to reach a verdict which shall speak the truth of the case and thereby do justice between the parties hereto, uninfluenced by sympathy, favor, affection or prejudice for or against any party. As I have already informed you, you are bound to receive and accept as correct the law as given you in this charge, and you are not privileged to entertain an opinion as to the law or what the law should be which conflicts in any respect with the law as stated in this charge. However, I have not attempted to embody all the law applicable to

this case in any one of the instructions contained in this charge, and therefore, you must consider the charge in its entirety, giving due weight to each instruction, and construing each instruction in the light of, and in harmony with, the other instructions, and so apply the principles set forth to all of the evidence received during the trial.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than given in these instructions, just as it would be a violation of your sworn duty as judges of the facts, to base a verdict upon anything but the evidence in the case and the reasonable inferences arising from such evidence.

INSTRUCTION NO. 2

At the outset, I urge you to make every effort to reach an agreement in your deliberations. Inconclusive trials are not desirable. A common understanding among competent and intelligent people ought to be possible.

However, this observation must not be construed by any juror as a suggestion of the abandonment of an opinion held understandably and earnestly, just for the sake of agreement. The Court must never coerce agreements by jurors. It is appropriate to suggest that if you should find yourselves in apparent disagreement, each of you should carefully reexamine your opinions before assuming a position of dissent.

I should give you one preliminary word of caution. It is seldom wise or beneficial for a juror to make an emphatic expression of his or her opinion of the case, or to announce a determination to stand for a certain verdict, immediately upon entering the jury room at the beginning of deliberations. The reason for this is obvious. We are all human, and it is difficult to recede from a position once it has been firmly and definitely stated.

INSTRUCTION NO. 3

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You have heard the terms direct evidence and circumstantial evidence. You are instructed that you should not be concerned with those terms since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

INSTRUCTION NO. 4

During the trial I have ruled on objections to certain evidence. You must not concern yourselves with the reason for such rulings as they are controlled by rules of law.

You must not speculate or form or act upon any opinion as to how a witness might have testified in answer to questions which I have rejected during the trial, or upon any subject matter to which I have forbidden inquiry.

In coming to any conclusion in this case, you must be governed by the evidence before you and by the evidence alone.

You have no right to indulge in speculation, conjecture or inference not supported by the evidence.

The evidence from which you are to find the facts consists of the following: (1) the testimony of the witnesses;(2) documents and other things received as exhibits; and (3)any facts that have been stipulated -- that is formally agreed to by the parties.

The following things are not evidence: (1) statements, comments, questions and arguments by lawyers for the parties; (2) objections to questions; and (3) anything you may have seen or heard about this case outside the courtroom.

INSTRUCTION NO. 5

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In determining the weight to be given to the testimony of the witnesses, you should take into consideration their interest in the result of the suit, if any appears, their conduct and demeanor while testifying, their apparent fairness or bias, their relationship to the parties, if any appears, their opportunities for seeing or knowing and remembering the things about which they testified, the reasonableness or unreasonableness of the testimony given by them, any previous statement or conduct of the witness that is consistent or inconsistent with the testimony of the witness at this trial, and all of the evidence, facts, and circumstances proved which tend to corroborate or contradict such evidence, if any appear. You are not bound to take the testimony of any witness as true, and should not do so if you are satisfied from all the facts and circumstances proved at the trial that such witness is mistaken in the matter testified to, or that for any other reason appearing in the evidence, the testimony is untrue or unreliable.

The fact that one side may have used a greater number of witnesses or presented a greater quantity of evidence should not affect your decision. Rather, you should determine which witness or witnesses, and which evidence appears accurate and trustworthy. It is the weight of the evidence that counts -- not the number of witnesses.

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary if, after consideration of all of the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

INSTRUCTION NO. 6

You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion. Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, consider the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

INSTRUCTION NO. 7

By a preponderance of the evidence is meant that such evidence, when considered and compared with that opposed to it, is more convincing and produces in your minds a belief that what is sought to be proved is more likely true than not. This rule does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

INSTRUCTION NO. 8

In this case, plaintiff is an individual and defendant, BNSF Railway Company is a corporation. All of the parties to a lawsuit are entitled to the same fair and impartial consideration, whether they are corporations or individuals.

INSTRUCTION NO. 9

Testimony was presented to you in the form of a deposition. A deposition is the recorded answers a witness made under oath to questions asked by lawyers before trial. You should consider the deposition testimony, and judge its credibility, as you would that of any witness who testifies here in person.

INSTRUCTION NO. 10

This is a civil case brought by Frank P. Hohn against BNSF Railway Company. Throughout these instructions, plaintiff will be referred to as plaintiff or by his last name, and BNSF Railway Company will be referred to as defendant or BNSF.

INSTRUCTION NO. 11

Plaintiff and defendant have stipulated -- that is, they have agreed -- that certain facts are established. You should, therefore, treat the following facts as having been proved:

1) Plaintiff is legally blind due to his peripheral vision being less than twenty degrees. Hohn is an individual with a disability within the meaning of the Americans with Disabilities Act. He is a resident of Hemingford, Box Butte County, Nebraska.

2) The BNSF is a Delaware corporation and employs more than fifteen people. BNSF is a railway company with mechanical facilities in Alliance, Nebraska.

3) Hohn was hired by the BNSF on December 8, 1997, to work as a locomotive machinist in the BNSF's Alliance facility.

4) The essential functions of the machinist position at BNSF Alliance mechanical facility include:

a) Performing locomotive servicing, maintenance, troubleshooting and other machinists' duties as directed by a supervisor or per union agreement.

b) Inspecting locomotive components (including internal engine inspection of pistons, cylinders, liners and crank case) periodically as required by federal regulation and at other intervals per company policy.

c) Inspecting fuel and all other fluid levels in locomotive, as necessary.

d) Inspecting wheels to ensure that flange, rims, treads, plate, hub, axle and bearing are in good repair.

e) Inspecting brake apparatus including brake shoes, beams, hangers, rods and associated equipment, inspects locomotives for any visible or audible leaks in water, fuel, or oil lines.

f) Using test equipment to install, calibrate, and verify the operational specifications of equipment and systems.

g) Operating proper electric, pneumatic, or hydraulic hand tools such as drills, impact wrenches, power saws and grinders.

h) Accurately distinguishing and interpreting signals, signs, machine/equipment displays, and accurately distinguishing colors as well as possessing spatial perception to work safely within, around, over and under locomotives.

I) Safe and frequent using of machinery/equipment (such as power tools, hand tools, overhead and wheel based cranes, etc.).

j) Frequent bending, stooping, kneeling, and climbing ladders, and frequent walking on uneven/angled surfaces.

5) On December 11, 2003, Hohn fell while working the second shift for BNSF and fractured the bone above his right

wrist. As a result, Hohn was put on a type of light duty during the time he recovered from the fracture.

6) Hohn was released to work without restriction in late March or early April, 2004, and was assigned to work in C Building of the BNSF Alliance Facility.

7) Calvin Hobbs was the Shop Superintendent for the Alliance mechanical facility between 2003 and November 2005.

8) Calvin Hobbs decided to pull Hohn from duty in order to allow Hohn to get his vision checked so that a decision could be made as to whether Hohn could work safely.

9) Hohn chose to see Dr. Robert Dietrich for his eye exam on May 10, 2004. Dr. Dietrich is an optometrist licensed in the State of Nebraska and has been practicing for 34 years.

10) Dr. Dietrich found that Hohn had an advanced stage of Retinitis Pigmentosa when he saw him on May 10, 2004. Retinitis Pigmentosa is a degenerative eye disease resulting in tunnel vision and night blindness or nyctalopia with a high propensity to go blind. There is no known cure for Retinitis Pigmentosa.

11) On June 4, 2004, Calvin Hobbs agreed to extend the time Hohn was on paid medical leave until June 9, 2004, to allow Hohn additional time to get his medical evaluation.

INSTRUCTION NO. 12

ADA - DISPARATE TREATMENT

Your verdict must be for plaintiff and against defendant if all of the following elements have been proved:

First, plaintiff is legally blind;

Second, such legal blindness substantially limits plaintiff's ability to engage in the major life activity of seeing;

Third, defendant did not allow plaintiff to return to work after he was removed from duty on April 29, 2004, and had his vision evaluated;

Fourth, plaintiff could have performed the essential functions of the locomotive machinist position at the time defendant refused to allow him to return to work; and

Fifth, defendant knew of plaintiff's legal blindness and plaintiff's legal blindness was a motivating factor in defendant's decision not to allow plaintiff to return to work after his vision was evaluated.

The parties agree the first three elements have been proved. If you find plaintiff has failed to prove either element 4 or 5, your verdict will be for the defendant on this claim.

If you find by a preponderance of the evidence that plaintiff has proved both elements 4 and 5, your verdict will be for plaintiff on this claim unless you find that the defendant is entitled to a verdict under Instructions No. 16 or 17.

INSTRUCTION NO. 13

ADA - REASONABLE ACCOMMODATION

Your verdict must be for plaintiff and against defendant if all of the following elements have been proved:

First, plaintiff is legally blind;

Second, such legal blindness substantially limits plaintiff's ability to engage in the major life activity of seeing;

Third, defendant knew of plaintiff's legal blindness;

Fourth, plaintiff could have performed the essential functions of the locomotive machinist position at the time defendant refused to allow him to return to work if plaintiff had been provided with an on the job, work site, evaluation and provided the accommodations resulting from such evaluation;

Fifth, providing an on the job, work site evaluation and the accommodations resulting from such evaluation would have been reasonable; and

Sixth, defendant failed to provide an on the job, work site evaluation and failed to provide any other reasonable accommodation.

The parties agree the first three elements have been proved. If you find plaintiff has failed to prove either element 4, 5, or 6, your verdict will be for the defendant on this claim.

If you find by a preponderance of the evidence that plaintiff has proved elements 4, 5, and 6, your verdict will be

for plaintiff on this claim unless you find that the defendant is entitled to a verdict under Instruction Nos. 16 or 17.

INSTRUCTION NO. 17

The parties have stipulated in Instruction No. 11 that certain functions of the locomotive machinist position are essential. In determining whether any other functions of the locomotive machinist position are essential, you should consider the following factors: (1) The employer's judgment as to which functions of the job are essential; (2) written job descriptions; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the functions; (5) the terms of a collective bargaining agreement; (6) the work experience of persons who have held the job; (7) the current work experience of persons in similar jobs; (8) whether the reason the position exists is to perform the function; (9) whether there are a limited number of employees available among whom the performance of the function can be distributed; (10) whether the function is highly specialized and the individual in the position was hired for his expertise or ability to perform the function.

No one factor is necessary or controlling. You should consider all the evidence in deciding whether a job function is essential.

The term "essential functions" means the fundamental job duties of the employment position plaintiff holds or for which plaintiff has applied. The term "essential functions" does not include the marginal functions of the position.

INSTRUCTION NO. 15

You may not return a verdict for plaintiff just because you might disagree with defendant's decision or believe it is harsh or unreasonable.

INSTRUCTION NO. 16

Your verdict must be in favor of defendant if it has been proved by a preponderance of the evidence that providing plaintiff with an on the job, work site, evaluation and the resulting accommodations from such evaluation would have caused an undue hardship on the operation of defendant's business.

The term "undue hardship," as used in these instructions, means an action requiring defendant to incur significant difficulty or expense when considered in light of the following:

1) the nature and cost of providing plaintiff with an on the job, work site, evaluation and the resulting accommodations from such evaluation;

2) the overall financial resources of the facility involved in the provision of providing plaintiff with an on the job, work site, evaluation and the resulting accommodations from such evaluation, the number of persons employed at such facility and the effect on expenses and resources;

3) the overall financial resources of defendant;

4) the overall size of the business of defendant with respect to the number of employees and the number, type and location of its facilities;

5) the type of operation of defendant, including the composition, structure, and functions of the workforce;

6) the impact of providing plaintiff with an on the job, work site, evaluation and the resulting accommodations from such evaluation, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

INSTRUCTION NO. 17

Your verdict must be in favor of defendant if it has been proved by a preponderance of the evidence that:

First, defendant did not allow plaintiff to return to work after he was removed from duty on April 29, 2004, and had his vision evaluated because plaintiff posed a direct threat to the health or safety of himself or others in the workplace; and

Second, such direct threat could not be eliminated by reasonable accommodation.

A direct threat means a significant risk of substantial harm to the health or safety of the person or other persons that cannot be eliminated by reasonable accommodation. The determination that a direct threat exists must be based on an individualized assessment of plaintiff's present ability to safely perform the essential functions of this job.

In determining whether a person poses a direct threat, you must consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the likely time before the potential harm occurs.

INSTRUCTION NO. 18

If you find in favor of plaintiff under Instruction No. 12 and/or Instruction No. 13, then you must award plaintiff such sum as you find will fairly and justly compensate plaintiff for any damages you find plaintiff sustained as a direct result of defendant's refusal to allow plaintiff to return to work and/or defendant's failure to provide plaintiff with any reasonable accommodation. Plaintiff's claim for damages includes three distinct types of damages and you must consider them separately.

First, you must determine the amount of any wages plaintiff would have earned in his employment with defendant if he had not been removed from duty on April 29, 2004, through the date of your verdict, minus the amount of earnings plaintiff received from other employment during that time.

Second, you must determine the amount of any other damages sustained by plaintiff, such as compensatory damages for emotional distress suffered by plaintiff as a result of defendant's conduct. You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.

You are also instructed that plaintiff has a duty under the law to "mitigate" his damages -- that is, to exercise reasonable diligence under the circumstances to minimize his

damages. Therefore, if it has been proved that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to him, you must reduce his damages by the amount of damages he reasonably could have avoided if he had sought out or taken advantage of such an opportunity.

INSTRUCTION NO. 19

If you find in favor of plaintiff under Instruction No. 12 and/or Instruction No. 13, but you do not find that plaintiff's damages have monetary value, then you must return a verdict for plaintiff in the nominal amount of One Dollar ($1.00).

INSTRUCTION NO. 20

In addition to the damages mentioned in the other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of plaintiff under Instruction No. 12 and/or Instruction No. 13, then you must decide whether defendant acted with malice or reckless indifference to plaintiff's right not to be discriminated against on the basis of a disability. Defendant acted with malice or reckless indifference if:

> it has been proved that defendant knew that ~~plaintiff's removal from duty~~ not allowing plf to return to work after April 29, 2004 was in violation of the law prohibiting disability discrimination, or acted with reckless disregard of that law.

However, you may not award punitive damages if it has been proved that defendant made a good-faith effort to comply with the law prohibiting disability discrimination.

If it has been proved that defendant acted with malice or reckless indifference to plaintiff's rights and did not make a good faith effort to comply with the law, then, in addition to any other damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages for the purposes of punishing defendant for engaging in such misconduct and deterring defendant and others from engaging in such misconduct in the future.

In determining whether to award punitive damages, you should consider whether defendant's conduct was reprehensible. In this regard, you may consider whether the harm suffered by plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether defendant's conduct that harmed plaintiff also caused harm or posed a risk of harm to others; and whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed plaintiff.

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1) How much harm defendant's wrongful conduct caused plaintiff.

2) What amount of punitive damages, in addition to other damages already awarded, is needed, considering defendant's financial condition, to punish defendant for its wrongful conduct toward plaintiff and to deter defendant and others from similar wrongful conduct in the future;

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to plaintiff.

INSTRUCTION NO. 21

Upon retiring to the jury room, you shall first select one of your number as foreperson to preside over your deliberations and who alone will sign the verdict form. You will then proceed immediately with your study and deliberations of the case.

In arriving at your verdict, remember it must be unanimous. Short of unanimity, you cannot consider that you have reached a verdict.

You will take with you a verdict form which you will use to reflect your verdict.

After you have arrived at your verdict, your foreperson will simply fill in the appropriate blank spaces provided in the form of verdict. Your foreperson will then date and sign the verdict form and that will constitute your verdict.

You will be allowed to separate for your meals and for any necessary intermission between 5 p.m. today and tomorrow morning at 9 a.m.

Upon arriving at your verdict and completion of the form of verdict by the foreperson, you will have concluded your task and you should notify me by telephone and someone will pick up the written note. Never attempt to communicate with the Court by any means other than a signed writing. And bear in mind that you are not to reveal to the Court or to any person how the jury

stands, numerically or otherwise, until you have reached a unanimous verdict.

In addition, you are to keep in mind all of the earlier admonitions of the Court and especially to refrain from any discussion of the case with anyone and to avoid reading or viewing any news about this case.

As the Judge presiding over the trial, I shall be available in this building throughout your deliberations and until your verdict has been returned and shall receive it promptly upon its return.